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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM
No. 165

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
Appellant,

vs.

STATE OF MINNESOTA, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF RAILROAD AND STEAMSHIP CLERKS, THE JOINT LEGISLATIVE BOARD AND THE RANGE MUNICIPALITIES AND CIVIC ASSOCIATION,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

STATEMENT OF APPELLEES, STATE OF MINNESOTA, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF RAILROAD AND STEAMSHIP CLERKS, THE JOINT LEGISLATIVE BOARD AND THE RANGE MUNICIPALITIES AND CIVIC ASSOCIATION, OPPOSING JURISDICTION AND MOTON TO DISMISS.

Come now the above appellees and move the Court, pursuant to Rule 16, paragraph 1(b) of the Revised Rules of this Court, to dismiss the appeal herein on the ground that it has no jurisdiction, for the following reasons:

1. The Court is without jurisdiction because no substantial federal question is raised by this appeal.

2. That the decision of the Supreme Court of Minnesota is sustainable upon nonfederal grounds sufficient to support it.

The motion of the appellees is filed herein pursuant to the above rule of this Court, in response to the statement as to jurisdiction, the appendix included therein, the printed record, and other papers filed by appellant, which urged this Court to review on appeal the opinion and judgment of the Supreme Court of the State of Minnesota.

STATEMENT OF THE CASE

Appellant attempts to appeal from a final judgment of the Supreme Court of Minnesota affirming the findings, order, and judgment of the District Court of St. Louis County.

All of the proceedings instituted and conducted by the commission were by virtue of statutory authority.[1]

Upon appeal to the District Court the weight to be given the findings and order of the commission is prescribed by statute, and is as follows:

> "* * * Such findings of fact shall be prima facie evidence of the matters therein stated, and the order shall be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant. If the court shall determine that the order appealed from is lawful and reasonable, it shall

[1] *M. S. A.* §§216.12, 216.17, and 216.21.

be affirmed and the order enforced as provided by law * * *."

M. S. A. §216.25.

On page 4[2] the order of the commission is quoted, and appellant, by its argument, infers that only the validity of such order is under attack, thereby disregarding the intervening and independent decision and judgment of the District Court. The District Court, after a consideration of all of the proceedings before the commission, together with evidence adduced upon the hearing before the District Court comprising 249 pages and 90 exhibits, concluded that the findings of the commission were supported by the evidence; that such findings supported the conclusions; that such findings and conclusions supported the order; and that the order was lawful and reasonable.[3]

Appellant, by its argument, concedes that the order of the commission is supported by the evidence, and that the decision of the District Court sustaining said order as lawful and reasonable, within the meaning of those terms as defined by the statutes of Minnesota and decisions of our Supreme Court, is supported by the evidence adduced upon the hearings before the commission and the District Court.

Included in appellant's statement are matters which are not pertinent to the question of jurisdiction. Aside from the inclusion of irrelevant and trivial matters, appellant's statement is interspersed with its own characterizations, interpretations, and conclusions, which are not supported by the record, in an effort to supply a substantial basis essential to sustain jurisdiction.

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[2] Unless otherwise indicated page reference will be to appellant's statement as to jurisdiction hereinafter referred to as Statement.

[3] Proceedings before District Court, Vol. III, pp. 1407 to 1656; findings and conclusions of District Court, Vol. I. p. 122.

On page 5 appellant poses two questions as being presented by the appeal. The first question in part reads:

> "Did bias, hostility, misconduct and prejudgment in the Commission so pervade the proceedings" as to deny appellant a fair hearing?

In its notice of appeal to the District Court from the findings and order of the commission, appellant did not assign bias, hostility, misconduct, and prejudgment in the commission, nor that it had not received a fair and impartial hearing. It appealed to the District Court "from each and every part of said order and from the rulings made by said commission relative to the jurisdiction of said Commission" (Vol. I, pp. 83, 84).

At the outset of the hearing before the District Court appellant's counsel informed the court with respect to appellant's position as:

> "Our paramount ground of appeal is, of course, that the order in this case is unlawful and unreasonable by reason of the lack of patronage on the trains and by reason of the prior valid outstanding order of the Commission permitting the abandonment of the passenger train service between Hibbing and Virginia."
> (Vol. III, p. 1440),

which was followed by 34 objections in detail, including:

> "The conduct of the Commission deprived defendant of a fair opportunity for hearing, as exemplified, in fact, by the announcement of Commissioner Peterson, prior to the receipt of any evidence that the Commission at its next regular business meeting would order the re-establishment of train service."
> (Vol. III, p. 1442)

By this specific objection appellant contended that the commission by issuing the ex parte order had prejudged the issue. The ex parte emergency order was issued by the

commission so as to continue the operation of appellant's passenger trains during the hearing. Such order was issued on May 6, 1953, to take effect on May 15, 1953, thereby affording appellant ample opportunity to test its validity by court proceedings before its effective date.

The validity of this order was upon appropriate proceedings challenged in the District Court, and the court set the order aside, not upon bias, hostility, misconduct, or prejudgment in the commission, nor for want of supportable facts, but upon the premise that "the commission was without jurisdiction in said matter" (Vol. I, p. 82). In consequence of the disposition made by the court of the ex parte emergency order, it has no relevancy to the question of jurisdiction notwithstanding appellant's numerous references to the ex parte emergency order (Statement, pp. 8, 9, 10, 11, 12, 14).

On page 18 appellant contends that by the following objection:

> "The proceedings and order of the Commission deprives defendant of the equal protection of the laws, of its property without just compensation, and without due process of law, in violation of the Constitution of the United States and the State of Minnesota."
> (Vol. III, p. 1442)

asserted in the District Court, it thereby raised the question that it had not received a fair hearing before the commission. The purpose of this objection was not upon the specific ground as now claimed by appellant that it had not received a fair hearing before the commission, but was directed to and concerned only that portion of the order of the commission which provided for a "reverse schedule" plan for the operation of appellant's trains. Appellant contended that the order to show cause and order for hearing (Vol. I, pp. 43, 44) was vague and indefinite and, conse-

quently, appellant was not advised of the fact that the notice for hearing issued by the commission contemplated any change in the plan or schedule for the operation of appellant's trains. During the hearing before the District Court appellant was given ample opportunity to be heard and present evidence not only upon this phase of the order of the commission but upon any other matter material to the issues before the District Court. Appellant was not in any manner limited nor restricted in presenting to the District Court any evidence which it deemed pertinent to sustain its position, as clearly appears from the record of the proceedings, comprising 249 pages, *supra.*

Appellant did not choose to rest its case in the District Court upon the record of the proceedings before the commission, nor upon the ground that it did not receive a fair hearing, but requested and was permitted to adduce additional evidence without limitation or restriction, subject only to its materiality upon the issues then presented.

Appellant in its statement has taken out of context isolated parts of the proceedings and placed its interpretation thereon which, when considered in light of the record, is incorrect and misleading.[4]

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[4] On page 8 appellant states: "Following this pronouncement, appellant commenced the presentation of its case. It had scarcely begun when it was asked to yield to an intervenor. Thereupon, eleven witnesses opposed to the 1952 order were trooped through the proceeding to testify briefly in favor of continuing the service," and on pages 10 and 11 makes this characterization: "The episode referred to above, involving the interruption of appellant's case to permit presentation of opposition witnesses, was accompanied by the Commission's sanctioning of a procedure reminiscent of the long-discarded Anglo-Saxon reliance on 'oath helpers'." The truth of the matter is that appellant's counsel stated that he would be "very happy" to accede to the request made to interrupt the proceedings so as to accommodate persons desiring to testify before the commission. The record discloses that when appellant's witness Scheidker was testifying the following request was made by counsel for appellee, Range Municipalities and Civic Association: "Mr. Cina: There are quite a number of people coming in who want to be heard and who wish to take the train back. I am wondering if

Appellant's characterization, pages 11 and 12, concerning the 24 persons who were sworn en masse, and for reasons not here material did not testify, has no relevancy to the question here involved, nor is it justified by the record.[5]

The matters just considered and commented upon are not substantial, but are inconsequential and trivial; they are not matters upon the question of jurisdiction. However, appellant's characterization of these matters, and the inferences which it has drawn therefrom, together with the importance ascribed thereto by appellant, is persuasive, if not conclusive, that more substantial material is wanting.

Mr. Stevens would consent to letting us interrupt in the middle of this proceeding to put the people on so they can take the train back." to which request appellant's counsel graciously responded: "Mr. Stevens: I will be very happy, and appreciate the business." (Vol. II, pp. 675, 676). At the conclusion of the testimony of witness Scheidker the presiding commissioner Rasmussen stated: "Ladies and Gentlemen, the hearing will reconvene at this time. Prior to the recess witnesses for the DM&IR were on and they have agreed, in order to accommodate you people who, I understand, are patrons of this railroad, that you may be heard at this time. So at this time the Commission will hear your testimony." (Vol. II, p. 699).

[5] There is no law in this state, nor rule or regulation of the commission, which forbids administering oaths, required to be taken by witnesses, to more than one person at the same time. The mere fact that these persons were sworn as witnesses and their names recorded in the proceedings was of no consequence, as it clearly appears from the ruling of the presiding commissioner on counsel's motion to strike the names of these persons from the proceedings, which ruling is as follows: "Commr. Rasmussen: Well, all parties to this hearing are aware of the fact that they have not submitted to cross examination—in order to just identify the number of people who came here. There is no inference one way or another, other than the people who have been witnesses. The Commission will deny your motion." Of like import is appellant's comments on page 17: "Lacking proof or even testimony on some points, the findings also made frequent reference to matters not susceptible to judicial or administrative notice with such catch phrases as 'It is common knowledge,' and 'Everyone knows.'" The phrases "It is common knowledge" and "Everyone knows", considered "catch phrases" by appellant, occur only three times in the findings of the commission (Statement, Appendix E, pp. 73, 74 and 75) and concerns climatological and road conditions in Minnesota which are common knowledge to every Minnesotan.

The proceedings before the commission on both hearings extended over many days. The record thereof includes 1406 pages, Vol. II, pages 1 to 86; Vol. III, pages 837 to 1406. Commissioner Peterson was present at all times. Appellant in its statement cites three specific instances and quotes remarks made by Commissioner Peterson and the response by its counsel (Statement, pages 8, 13 and 14).

The opinion of the Supreme Court quotes from the colloquy between Commissioner Peterson and counsel on three different occasions, and characterizes the remarks of Commissioner Peterson as misconduct—"it should not be reversed because of the misconduct of one of the members of the commission". Op. Supreme Court, Statement, Appendix A, pages 40, 41, 44.

The remarks made by Commissioner Peterson and criticized by the Supreme Court were injudicious and indecorous. There were instances when the discussion between Commissioner Peterson and counsel for appellant became heated, which counsel recognized when, at the conclusion of the hearing, he said:

> "There have been many times during the hearing when the discussions have gotten somewhat heated." (Vol. III, pp. 1405, 1406)

We do not approve some of the remarks made by Commissioner Peterson. However, we observe that "when the discussions have gotten somewhat heated" it oftentimes provokes unkind as well as improper remarks. We are not aware of any authority which holds that "heated discussions" occurring during an administrative hearing or judicial proceeding, in which counsel for one of the parties freely participates, satisfy the jurisdictional requirement for review by this Court.

The word "bias" repeatedly appears in appellant's statement and appellant inferentially argues that the Supreme

Court in its opinion found that Commissioner Peterson was biased. The Supreme Court did not hold that Commissioner Peterson or any other member of the commission was biased or had prejudged the issues. The Supreme Court, after examining the criticized remarks made by Commissioner Peterson, concluded that appellant was not prevented from submitting all of its evidence to the commission, and that upon appeal the District Court gave appellant "further opportunity to submit whatever additional evidence it desired to submit" (Appendix A, *supra*, pp. 43, 44). No finding was made by either the district or the Supreme Court that appellant did not receive a fair trial and hearing before the commission.

Appellant's contention that any member of the commission was biased or had prejudged the case, or that appellant was deprived of a fair hearing before the commission, despite the remarks of one of its members, is not sustained by the conclusions reached by the District Court, all of which were affirmed by the Supreme Court.

ARGUMENT

The Court is without jurisdiction because no substantial question is raised by this appeal.

Appellant's entire claim and its whole argument is bottomed upon the proposition that the remarks of one of the members of the commission deprived it of a fair hearing before the commission. As pointed out, *supra*, the District Court made a finding that appellant's claim of prejudgment in the commission had not been sustained (Appendix D, *supra*, p. 55).

At the risk of unduly prolonging our objections to appellant's assertion that the Supreme Court made a finding that any member of the commission was biased, we note

appellant's statement: "Second, assuming that bias, as found by the State Supreme Court, existed on the part of Commissioner Peterson alone", and then appellant proceeds with its argument upon the assumed premise that the court made a finding of bias. The court made no such finding. In the course of its opinion the court said that there is not "any way in which we can hold a member of the Railroad and Warehouse Commission is disqualified for bias" (Appendix A, p. 43).

Appellant's argument, premised upon the theory: "assuming that bias as found by the Supreme Court exists", begins with and proceeds upon an erroneous hypothesis.

The federal cases cited on page 23 involve the validity of decisions, judicial and administrative, where the trier was biased. All of these cases involve controversies arising out of the NLR Act. USCA, Title 29, §151 et seq. This law provides for a direct appeal from the final order of the NLR Board to the Circuit Court of Appeals. When such an appeal has been taken the board is required to make a return and certification to the court, whereupon exclusive jurisdiction is vested in the court and it may make and enter a decree enforcing, modifying, and enforcing the order as modified, or set aside, in whole or in part, the order of the board, Title 29, *supra,* §160. No provision is made in the NLR Act for a review of the order of the board by an intermediate court with judicial authority to consider all of the evidence received and proceedings taken by the board, together with additional evidence, and from the whole thereof render its independent decision as prescribed by the Minnesota Statutes heretofore cited.

Appellant in its argument has failed to give recognition to the dual nature of the proceedings of the case at bar, which encompasses the hearing before the commission as well as the hearing before the District Court. Its argument

upon the proposition that it did not receive a fair hearing is confined to the hearing before the commission. Appellant has failed to take into consideration the fact that upon the hearing before the District Court it availed itself of the right to present, and did present, all of the evidence which it desired to submit. In affirming the decision of the District Court the Supreme Court considered not only the evidence before the commission but also the evidence adduced upon the independent judicial proceeding in the District Court, and concluded, upon the record of both proceedings, that appellant had been accorded a fair hearing before the commission and the District Court.

The District Court upon an appeal from an order of the commission sits as an independent intermediate court, exercising judicial and not legislative functions, as clearly appears from a recent opinion filed on February 24, 1956.[6]

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[6] *State of Minnesota v. Chicago and Northwestern Railway Company*, 75 N. W. 2d 411. In the course of the opinion the court said "The role of the district court in reviewing an order of the commission, as prescribed by the legislature, is to determine whether the order is lawful and reasonable.[3] This function has received considerable judicial interpretation and explanation.[4] It may be summarized as the dual function of determining (1) whether the commission's findings of fact are reasonably supported by the evidence and (2) whether in light of such facts the order is reasonable and lawful.[5] Under this latter function the court must consider whether the order is compatible with the provisions of the Federal and State constitutions and laws and within the power granted the commission; whether the order is based on some mistake or misapplication of the law; or whether it is so arbitrary as to be beyond the exercise of reasonable discretion and judgment.[6] The scope of review of the district court has been properly likened to that of an appellate court in reviewing the findings of a jury.[7] The role of the Supreme Court is that of determining whether all the evidence presented, including that submitted to the commission as well as that submitted to the district court, reasonably sustains the district court's finding that the order of the commission is lawful and reasonable."[8]

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[3] *M. S. A.* §216.25. The statute also provides that the commission's findings of fact "shall be prima facie evidence of the matters therein stated" and that its order "shall be prima facie reasonable."

[4] See, e.g., *N. P. Ry. Co. v. Village of Rush City*, 230 Minn. 144, 40 N. W. 2d 886; *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 229 Minn. 312, 39 N. W. 2d 752; *Twin City Motor Bus Co. v. Rechtzigel*, 229 Minn. 196, 38 N. W. 2d 825; *Arrowhead Bus Service, Inc. v. Black & White D. C. Co., Inc.*, 226 Minn. 327, 32 N. W. 2d 590; *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 221 Minn. 400, 22 N. W. 2d 569; *State and R. & W. Comm. v. Minneapolis & St. L. R. Co.*, 209 Minn. 564, 297 N. W. 189; *State v. Tri-State T. & T. Co.*, 204 Minn. 516, 284 N. W. 294; *Abrahamson v. Canadian Northern Ry. Co.*, 177 Minn. 136, 225 N. W. 94; *Citizens of Pipestone v. Chicago, M. & St. P. Ry. Co.*, 167 Minn. 174, 208 N. W. 809, 209 N. W. 913; *Schain v. G. N. Ry. Co.*, 137 Minn. 157, 162 N. W. 1079; *State v. G. N. Ry. Co.*, 135 Minn 19, 159 N. W. 1089; *State v. G. N. Ry. Co.*, 130 Minn. 57, 153 N. W. 247; *Rock Island Motor Transit Co v. Murphy Motor Freight Lines, Inc.* (D. Minn.), 101 F. Supp. 978; see, 16 *Dunnell's Dig.* (3 Ed.), §8082.

[5] *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 229 Minn. 312, 39 N. W. 2d 752; *Twin City Motor Bus Co. v. Rechtzigel*, 229 Minn. 196, 38 N. W. 2d 825; *State and R. & W. Comm. v. Minneapolis & St. L. R. Co.*, 209 Minn. 564, 297 N. W. 189; *State v. G. N. Ry. Co.*, 130 Minn. 57, 153 N. W. 247.

[6] *State and R. & W. Comm. v. Minneapolis & St. L. R. Co.*, 209 Minn. 564, 572, 297 N. W. 189, 193; *State v. G. N. Ry. Co.*, 130 Minn. 57, 61, 153 N. W. 247, 248. See, e.g., *State v. Thomson*, 210 Minn. 147, 297 N. W. 715, where this court held that the denial of an application to substitute "custodian service" for part-time agency service was, under the circumstances of that case, arbitrary and unreasonable.

[7] *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 229 Minn. 312, 320, 39 N. W. 2d 752, 757; *State and R. & W. Comm. v. Minneapolis & St. L. R. Co.*, 209 Minn. 564, 571, 297 N. W. 189, 193; *Abrahamson v. Canadian Northern Ry. Co.*, 177 Minn. 136, 139, 225 N. W. 94, 95.

[8] *State and Port Authority of St. Paul v. N. P. Ry. Co.*, 229 Minn. 312, 39 N. W. 2d 752; *Twin City Motor Bus Co. v. Rechtzigel*, 229 Minn. 196, 38 N. W. 2d 825; *State v. Duluth, M. & I. R. Ry. Co.*, filed February 24, 1956, — Minn. —, — N. W. 2d —. No additional evidence was submitted to the district court in the instant case.

In an earlier opinion the Supreme Court examined the statutory provisions relative to the powers and duties of the commission and prior decisions of the court, and pronounced the law to be observed and applied.[7]

The "rule of necessity" (Statement, p. 23) is not applicable for the reason that the Minnesota Railroad and Warehouse Commission is composed of three members whose

[7] *State and Port Authority of St. Paul v. Northern Pacific Railway Company and Others*, 229 Minn. 312, 320: "In discharging its purely judicial function of determining whether the rates and regulations established by the commission are lawful and reasonable, the district court is governed by the statutory rule (§216.25) that *the commission's findings of fact shall be prima facie evidence of the matters therein stated, and that its order shall be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant.* (See, also, §216.19.) Under this rule, the district court may not, in exercising its own independent judgment, make findings in utter disregard of those of the commission. In the first place, the findings of fact by the commission are in themselves prima facie evidence of the matters therein stated, and such matters so found must be accepted by the district court as established until their prima facie foundation, in the light of the evidence as a whole, is swept away by *clear and convincing evidence to the contrary*. The presumption of reasonableness attached by §216.25 to the findings and the order of the commission is not to be treated lightly and confused with the ordinary statutory presumption which usually may be rebutted with slight evidence. 9 Am. Jur., Carriers, §90. The rule of review by the district court is the same as that of an appellate court in reviewing the findings of a jury.[6] *State and R. R. & W. H. Comm. v. M. & St. L. R. Co.*, 209 Minn. 564, 297 N. W. 189; *Abrahamson v. C. N. Ry. Co.*, 177 Minn. 136, 225 N. W. 94. The constitutional right to due process of law through an independent judicial review—pursuant to which the reviewing court, after affording the parties an opportunity to present such additional evidence as may be material, determines for itself whether the commission's order is lawful and reasonable and whether it is reasonably supported by the evidence at the time of its making—is not impaired by an application of the rule that the statutory presumption of reasonableness, after a full hearing by the commission, may be rebutted only by clear and convincing evidence."

[6] In *Steenerson v. G. N. Ry. Co.*, 69 Minn. 353, 410, 72 N. W. 713, 729, Mr. Justice Mitchell, in a concurring opinion, said:

"* * * it is only when a rate is manifestly so grossly inadequate that it could not have been fixed in the exercise of an honest and intelligent judgment that the courts have any right to declare it to be confiscatory."

duties are prescribed by statute and who act as a unit. There is no statute which provides for the disqualification of any member of the commission. The reason why we have no such statute is rather obvious for the reason that the District Court upon appeal, having the judicial powers as heretofore noted, sits as an independent and intermediate court with full authority and judicial power to receive and hear all evidence upon the issues pending, and to render decisions in accord with the statutory provisions heretofore referred to.

Appellant anchors its case in this Court upon the opinion of the Federal Court in *Berkshire Employees Ass'n v. N. L. R. B.*, 121 F. 2d 235 (Statement, pp. 20, 21), which decision is, for the reasons heretofore stated and those which follow, not here controlling. The *Berkshire* case involves a dispute arising out of the NLR Act. Appellant in its argument in regard to the decision in the *Berkshire* case again proceeds upon an erroneous hypothesis, and assumes that the court made a finding that a member of the board was biased. See last sentence occurring on page 20, appellant's statement.

The court did not make a finding that any member of the board was biased. As a matter of fact, the court made no finding of fact upon any matter. The court considered the petition of *Berkshire*, addressed to the board, requesting permission to adduce evidence as to the activities of Mr. Edwin S. Smith, a member of the board, concerning his participation in matters connected with the controversy between Berkshire and the union prior to the filing of the complaint in the case. See p. 28 (8) of opinion.

The court ordered that Berkshire's petition to adduce the additional testimony on this point be granted, and remanded the case to the board for such further proceedings. See opinion, p. 239 (11).

The observations made by the court and quoted on page 21 by appellant would seem to be obiter dictum. Apparently after the board had heard the evidence which Berkshire sought to adduce, the final order of the board would, under the provisions of the NLR Act, be subject to further review and consideration by the Circuit Court of Appeals. A further distinction arises out of the judicial powers of the District Court which as an intervening and independent court considers not only the evidence adduced before the commission but may receive additional evidence for the purpose of determining whether the statutory provisions heretofore cited had been satisfied.

The federal decisions cited by appellant on page 22 in support of the legal proposition that bias does not vitiate an administrative decision when supported by substantial evidence, is not material for the reason that the Supreme Court did not find bias on the part of any member of the commission.

Appellant must admit that upon the hearing before the District Court it had an opportunity to submit, and did submit, all of the evidence which it deemed material to its position, thereby satisfying the requirements with regard to due process.

Appellant on page 23 states:

> "* * * the Court failed to recognize that if the procedure before the Commission did not accord with due process it matters not whether the result was or was not supported by evidence."

citing *Tumey v. Ohio*, 273 U. S. 510, 535, and the *Berkshire* case, *supra*.

We have previously commented upon the *Berkshire* case, and no further comment will be made.

The question presented in the *Tumey* case is stated by Mr. Chief Justice Taft on page 514:

> "The question in this case is whether certain statutes of Ohio, in providing for the trial by the mayor of a village of one accused of violating the Prohibition Act of the State, deprive the accused of due process of law and violate the Fourteenth Amendment to the Federal Constitution, because of the pecuniary and other interest which those statutes give the mayor in the result of the trial."

No question has been raised in regard to the validity of any Minnesota Statute upon this appeal. Consequently, the *Tumey* case does not sustain appellant's right to appeal from the judgment of the Supreme Court. Furthermore, the factual situation considered in the *Tumey* case is not comparable to the facts in the instant case, and the legal questions involved in both cases are not analogous.

Appellant's contention that it did not receive a fair hearing comes as an afterthought—made and asserted in its effort to delay the restoration of passenger service to the public, and particularly to the citizens of Duluth, the Range municipalities, and the towns and stations tributary to appellant's railroad, as prescribed by the order of the commission.

Appellant did not specify denial of a fair hearing before the commission as one of its objections to the order in its notice of appeal to the District Court (Vol. I, pp. 82, 83).

Again, when stating its oral objections to the order before the District Court, it then informed the court that the *paramount objection* to the order was "lack of patronage" and a "prior outstanding order" (Vol. III, p. 1440). The Supreme Court in its opinion affirming the decision of the District Court said:

> "While the railway company lists a number of assignments of error, the appeal involves essentially the question of whether or not the order of the Railroad and Warehouse Commission is lawful and reasonable

as those terms are legally defined in our statutory and case law."

(Appendix A, *supra*, p. 31)

It therefore seems clear that appellant's claim that it did not receive a fair hearing before the commission, as it now strenuously argues, was not advanced by appellant as the important and controlling question either in the District Court or in the Supreme Court. The decisive question in the District Court was whether the order of the commission was reasonable and lawful. The essential question before the Supreme Court was whether the order is lawful and reasonable, within the statutory and case law defining those terms, and supported by the evidence adduced before the commission and before the District Court.

The decision of the Supreme Court of Minnesota is sustainable upon nonfederal grounds sufficient to support it.

We have pointed out the statutory powers and duties of the Railroad and Warehouse Commission. We have cited decisions of our Supreme Court construing these statutory provisions and the weight to be given to the findings of the commission and its order by the District Court upon appeal.

We have pointed out that the District Court, after considering the evidence adduced before the commission, together with the evidence received upon the hearing before the District Court, concluded that the order of the commission is lawful and reasonable.

We have pointed out that the essential question before the Supreme Court was whether the order of the commission was lawful and reasonable within the purview of our statutes and case law.

The opinion of the Supreme Court clearly points out that notwithstanding the injudicious remarks of a member of the commission, appellant was not prevented from presenting its evidence to the commission; that appellant was in no manner restricted in submitting to the District Court whatever evidence it desired to submit, and that the decision of the District Court upholding the order of the commission as lawful and reasonable is sustained by the evidence adduced upon the hearing before the commission and the hearing in the District Court.

In these circumstances, and upon the decisions of the District Court and the Supreme Court, we submit that the appeal herein should be dismissed, as it affirmatively appears that the decision of the Supreme Court is sustainable upon the statutory provisions, *supra*, and the decisions of our own court heretofore cited.

It likewise affirmatively appears that appellant has failed to demonstrate that the opinion of the Supreme Court, from which the appeal is taken, is not sustainable upon the statutes of Minnesota and our case law.

A recent decision of this Court, *Durley v. Mayo*, 76 S. Ct. 806, decided June 4, 1956, sustains the position and contention of appellees.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed for lack of jurisdiction.

It is further respectfully submitted that since no reasonable ground for granting a petition for writ of certiorari appears, no such writ should be granted.

Respectfully submitted,

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